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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

YURI VANETIK, Plaintiff and Appellant, v. HART ENERGY PUBLISHING, LLLP, Defendant and Respondent.	G045954 (Super. Ct. No. 30-2010-00435479) O P I N I O N

Appeal from an order of the Superior Court of Orange County, Sheila Fell, Judge. Affirmed.

Telep Law and Desiree Telep for Plaintiff and Appellant.

Davis Wright Tremaine, Alonzo Wickers IV and Jonathan L. Segal for Defendant and Respondent.

* * *

INTRODUCTION

After a lawsuit was filed against Yuri Vanetik in federal district court, Hart Energy Publishing, LLLP (Hart), posted on its Web site an article summarizing the lawsuit's causes of action. Vanetik sued Hart for, among other things, defamation. Hart filed a motion to strike the complaint pursuant to Code of Civil Procedure section 425.16, commonly referred to as the anti-SLAPP (strategic lawsuit against public participation) statute (the anti-SLAPP motion). The trial court granted the anti-SLAPP motion, and Vanetik appeals.

The trial court did not err in finding Hart had met its burden to prove Vanetik's claims arose from Hart's protected activity, and Vanetik failed to establish a probability of prevailing on the merits. To the extent Vanetik's other arguments are properly before us on appeal, we reject them. We therefore affirm the trial court's order.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

In October 2008, Turan Petroleum, Inc. (Turan), filed a lawsuit against Vanetik and others in federal district court. Shortly after the federal lawsuit was filed, Turan issued a press release setting forth the factual and legal allegations of the lawsuit.

Two days after Turan's press release, Hart posted an article about the federal lawsuit on its OilandGasInvestor.com Web site, summarizing the lawsuit's allegations. The Hart article reads, in its entirety, as follows: "Costa Mesa, Calif.-based Turan Petroleum Inc. has filed a civil complaint against former management who controlled the company until May and certain persons and entities affiliated with them alleging that they engaged in a fraudulent scheme to obtain millions of shares of Turan stock for free. [¶] Turan also claims the former management, including Yuri Vanetik, former chief executive and chairman Anatoly Vanetik and Hiep T. Trinh, and their alleged co-conspirators received millions of dollars from subsequent illicit sales of many

of their 'free' shares while Turan was struggling financially and in dire need of capital. [¶] The company claims the defendants 'parked' Turan stock in the names of persons or entities who never paid for the shares; sold these shares to the public for millions of dollars in illegal transactions; forged stock powers of shareholders who were unaware that their shares had been transferred out of their names; and transferred millions of dollars to offshore bank accounts in the names of foreign companies. The defendants, collectively, received up to approximately $15 million or more in proceeds from the sales. [¶] Turan CEO and chairman Askar Karabayev says, 'The allegations in the complaint involve a very serious case of fraud by sophisticated individuals who exploited the company for their own personal gain. I am confident that the company will get past these unfortunate events and I look forward to a prosperous future for Turan.' [¶] Turan primarily has E&P assets in Kazakhstan and Russia."

Turan's federal lawsuit was dismissed with prejudice in mid-2009. Vanetik's attorneys requested that various news organizations and Internet service providers, including Hart, delete articles regarding the Turan lawsuit from their Web sites. Hart removed the article regarding the Turan lawsuit from its Web site. Several months later, the article reappeared on Hart's Web site after restoration of power following an outage. Hart again removed the article.

In December 2010, Vanetik sued Hart and other owners of Internet sites that had published the Turan lawsuit press release or articles about the Turan lawsuit. The causes of action against Hart included defamation per se, defamation per quod, false light invasion of privacy, intentional infliction of emotional distress, and misappropriation of name and likeness. Hart responded with the anti-SLAPP motion. The trial court granted the anti-SLAPP motion, finding that Vanetik's claims arose from Hart's protected activity, and that Vanetik had failed to establish a probability of prevailing on the merits of his claims. Vanetik timely appealed.

DISCUSSION

I.

STANDARD OF REVIEW

We review the trial court's order granting the anti-SLAPP motion de novo. (*Flatley v. Mauro* (2006) 39 Cal.4th 299, 325-326.) "'We consider "the pleadings, and supporting and opposing affidavits . . . upon which the liability or defense is based." [Citation.] However, we neither "weigh credibility [nor] compare the weight of the evidence. Rather, [we] accept as true the evidence favorable to the plaintiff [citation] and evaluate the defendant's evidence only to determine if it has defeated that submitted by the plaintiff as a matter of law." [Citation.]' [Citation.]" (*Id*. at p. 326.)

"[Code of Civil Procedure s]ection 425.16, subdivision (b)(1) requires the court to engage in a two-step process. First, the court decides whether the defendant has made a threshold showing that the challenged cause of action is one arising from protected activity. The moving defendant's burden is to demonstrate that the act or acts of which the plaintiff complains were taken 'in furtherance of the [defendant]'s right of petition or free speech under the United States or California Constitution in connection with a public issue,' as defined in the statute. [Citation.] If the court finds such a showing has been made, it then determines whether the plaintiff has demonstrated a probability of prevailing on the claim. Under section 425.16, subdivision (b)(2), the trial court in making these determinations considers 'the pleadings, and supporting and opposing affidavits stating the facts upon which the liability or defense is based.'" (*Equilon Enterprises v. Consumer Cause, Inc*. (2002) 29 Cal.4th 53, 67.)

II.

PROTECTED ACTIVITY

A defendant can meet his or her burden of making a threshold showing that a cause of action arises from protected activity by demonstrating the acts underlying the plaintiff's cause of action fall within one of the categories of Code of Civil Procedure

section 425.16, subdivision (e). (*City of Cotati v. Cashman* (2002) 29 Cal.4th 69, 78.) Section 425.16, subdivision (e) provides, in relevant part, as follows: "As used in this section, 'act in furtherance of a person's right of petition or free speech under the United States or California Constitution in connection with a public issue' includes: . . . (2) any written or oral statement or writing made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law . . . ."

Neither in the trial court nor on appeal does Vanetik argue that his claims do not arise from Hart's protected activity under Code of Civil Procedure section 425.16, subdivision (e)(2). The posting regarding the Turan lawsuit on Hart's Web site was unquestionably a writing made in connection with an issue under consideration or review by a judicial body, and was therefore covered by the anti-SLAPP statute.[1]

III.

LIKELIHOOD OF PREVAILING ON THE MERITS

Civil Code section 47 absolutely bars all of Vanetik's claims against Hart. That section provides, in relevant part: "A privileged publication . . . is one made: [¶] . . . [¶] (d)(1) By a fair and true report in . . . a public journal, of (A) a judicial . . . proceeding, or (D) of anything said in the course thereof . . . . [¶] (2) Nothing in paragraph (1) shall make privileged any communication to a public journal that does any of the following: [¶] (A) Violates Rule 5-120 of the State Bar Rules of Professional Conduct. [¶] (B) Breaches a court order. [¶] (C) Violates any requirement of confidentiality imposed by law." (Civ. Code, § 47, subd. (d).)

[1] Hart also argued, and the trial court found, Vanetik's claims arose from Hart's protected activity under Code of Civil Procedure section 425.16, subdivision (e)(4): "any other conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest." Because we conclude the activity is protected under section 425.16, subdivision (e)(2), we need not address whether it is also protected under an additional subdivision.

The report on the pleadings of the federal Turan lawsuit, which appeared on Hart's Web site, is absolutely privileged under Civil Code section 47, subdivision (d). (*Sipple v. Foundation for Nat. Progress* (1999) 71 Cal.App.4th 226, 240-241.) To be protected, the report need not simply quote the federal lawsuit's allegations: "[A] certain degree of flexibility/literary license [is permitted] in defining 'fair report.'" (*Reader's Digest Assn. v. Superior Court* (1984) 37 Cal.3d 244, 262, fn. 13.) As long as Hart's article captured the substance or gist of the allegations of the underlying federal lawsuit, it will receive protection under section 47, subdivision (d). (*Sipple v. Foundation for Nat. Progress, supra,* at p. 244.) A reporter or publisher is not required to determine the merits of the allegations before publishing a summary of a court filing, or to present the other side's version of the facts. (*Rollenhagen v. City of Orange* (1981) 116 Cal.App.3d 414, 427, disapproved on other grounds in *Brown v. Kelly Broadcasting Co.* (1989) 48 Cal.3d 711; *Reeves v. American Broadcasting Companies, Inc.* (2d Cir. 1983) 719 F.2d 602, 606.)

Vanetik does not argue on appeal that the trial court erred in finding he had failed to establish a likelihood of prevailing on the merits of his claims because Hart's article was absolutely privileged under Civil Code section 47, subdivision (d). None of the exceptions listed in section 47, subdivision (d)(2) applies here.

IV.

WE REJECT VANETIK'S ADDITIONAL ARGUMENTS.

Vanetik raises three arguments on appeal for reversal of the order granting the anti-SLAPP motion, none of which has any merit. First, Vanetik argues that Hart's action in voluntarily removing the article from its Web site on two occasions constitutes an admission that the publication of the article defamed Vanetik. Second, he contends those acts constitute negligence. Vanetik failed to raise either of these arguments in the trial court; the arguments have therefore been forfeited on appeal. (*People ex rel. Dept. of Transportation v. Superior Court* (2003) 105 Cal.App.4th 39, 46.)

Even if those arguments were properly before this court, we would reject them. There is no support for Vanetik's arguments that Hart's voluntary removal of the article from its Web site is an admission that the article was defamatory, or that Hart thereby undertook a duty it later negligently breached. Vanetik's only support for those arguments is his citation to two cases, neither of which is apposite. In *Rosen v. St. Joseph Hospital of Orange County* (2011) 193 Cal.App.4th 453, 455-456 (*Rosen*), another panel of this court affirmed an order sustaining a demurrer without leave to amend, because the plaintiff's claims, despite their labels, were actually causes of action for spoliation of evidence, and barred as a matter of law. Vanetik cites *Rosen* for the following proposition: "'"'[I]t is ancient learning that one who assumes to act, even though gratuitously, may thereby become subject to a duty of acting carefully, if he acts at all.' [Citation.] . . ."'" (*Id.* at p. 461.) *Rosen* distinguished the lack of a general tort duty to preserve evidence—the situation presented by *Rosen*—from the facts of *Cooper v. State Farm Mutual Automobile Ins. Co.* (2009) 177 Cal.App.4th 876, in which the appellate court concluded a claim could be stated for breach of an express promise to preserve evidence. *Rosen* has no applicability in the current case. Hart did not make an express promise to do or not do anything. Hart owed no duty to Vanetik, much less did it negligently breach such a duty.

Vanetik also cites *McGee v. Stone* (1858) 9 Cal. 600, 601, for the proposition that "'[a]dmissions, whether of law or of fact, which have been acted upon by others, are conclusive against the party making them, in all cases, between him and the person whose conduct he has thus influenced. It is of no importance whether they were made in express language to the person himself, or implied from the open or general conduct of the party. For in the latter case, the implied declaration may be considered as addressed to every one in particular who may have occasion to act upon it. In such cases, the party is estopped, on grounds of public policy and good faith, from repudiating his own representations.'" This quote comes from the summary of counsel's arguments, not

from the court's opinion. In any event, Vanetik's argument would mean that any act undertaken by anyone is an admission that their previous act or omission was wrongful.

Finally, Vanetik argues that "Code of Civil Procedure section 425.16 and Civil Code section 47 must be modified in order to deter against future rulings of the same nature and to prevent further abrogations of justice under these statutes." (Boldface, underscoring, and some capitalization omitted.) The separation of powers doctrine requires that we decline Vanetik's request. (*People v. Bunn* (2002) 27 Cal.4th 1, 16-17 ["separation of powers principles . . . limit judicial efforts to rewrite statutes even where drafting or constitutional problems may appear"]; *California Teachers Assn. v. Governing Bd. of Rialto Unified School Dist.* (1997) 14 Cal.4th 627, 633 ["'the judicial role in a democratic society is fundamentally to interpret laws, not to write them. The latter power belongs primarily to the people and the political branches of government . . . .' [Citation.] . . . 'This court has no power to rewrite the statute so as to make it conform to a presumed intention which is not expressed'"].)

DISPOSITION

The order is affirmed. Respondent to recover costs on appeal.

FYBEL, J.

WE CONCUR:

MOORE, ACTING P. J.

ARONSON, J.